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COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
April 26, 1902.

STATEMENT OF MR. JOSEPH NIMMO, JR., STATISTICIAN AND ECONOMIST.

Mr. NIMMO. Mr. Chairman, I do not propose to range over the entire subject which you are now considering. I have recently written a pamphlet to which I have devoted three months of my time and effort. It expresses very fully my thought in regard to the particular phases of the subject to which I shall now invite your attention.

There is one matter of great importance, Mr. Chairman, which I desire to bring to your attention. I refer to action taken about a month ago before the United States circuit court at Chicago, which has an important bearing upon the particular bill—the Corliss bill—which you are now considering.

It turns out that the act to regulate commerce has two arms, the right arm of the civil remedy and the left arm of the criminal remedy. The criminal remedy is provided in section 10, and the Interstate Commerce Commission has for the last fifteen years been working this left arm alone. The whole situation has been described to you by others, and I will not repeat it. It is very interesting. Recently the Commission seems to have discovered the efficacy of the right arm of judicial remedy provided in section 16 of the act to regulate commerce, and they have had recourse to that section in a case which came up before Judge Grosscup in Chicago in March last.

Judge Grosscup in that case said :

> The question presented by this application is a new one and a very great one, and I will not pass upon it finally until there have been elaborate arguments on each side. If the United States courts, sitting in equity, have the power called for it will make them master of the whole rate situation, for an inquiry instituted by them to inquire whether the injunction has been violated or not will, much more readily than criminal proceedings, probe to the bottom of the railroad's doings. For my own part, I believe that railroad rates ought to be as stable as postage rates, so that every shipper would know, as certainly as the sender of a letter, how much it would cost him and the fact that no one else could send it for less. An injunction something like this has been granted in other cases, notably in the Debs case, but an important distinction between that case and this is that in the Debs case the things complained of were in their nature temporary, while in this case the injunction will be against conduct running continuously into the future. The interstate-commerce act has hitherto been ineffectively executed, but the taking of such power by the courts, as this injunction implies, might turn out to be the vitalizing of the act.

That is hopeful. I concur in all that the learned judge said in regard to the evils complained of. I have no comment to make on that. The injunction is a feature of the case which we may look forward to hopefully. The injunction will be against conduct running continuously

into the future. That is a very cheering aspect of the case. As has been said, it will be a remedy for the future.

And Judge Grosscup says in conclusion:

> The interstate-commerce act has hitherto been ineffectively executed, but the taking of such power by the courts as this injunction implies might turn out to be the vitalizing of the act.

There is thus a hope held out that after having expended its energies upon the criminal remedy for fifteen years, within a month the Interstate Commerce Commission has had recourse to the civil remedy. It might turn out to be the vitalizing of the act.

So the suggestion I have to make to you practically is this: If there is such a hope held out why not postpone legislation of this kind until you have seen whether this vitalizing is going to take place? If we have waited fifteen years to get at section 16, why not wait a little while in order to see how the judicial procedure under it will turn out?

There is another important aspect of this question, and that is that section 3 of the Corliss bill in effect takes the vitality out of this vitalizing section. I will not argue that. I think if you will read the first two pages of section 16 as it is printed in the ordinary print of the interstate-commerce act and compare that with the substitute which is proposed in section 3, repealing the former, you will see that it takes the vitality out of what Judge Grosscup called the vitalizing of the act.

Another point. The courts have no power whatever under this act to overrule a ruling of this Commission. In theory it may seem well to give this Commission this unlimited power, but to throw upon five gentlemen not only the power to say whether a specific rate is right, but to order a whole schedule of rates on a road, on a system of roads, and even on a great series of systems, is giving them a tremendous power. It is a great political power. With that power given to the Commission you would be besieged by claims in a way which you can hardly imagine. You gentlemen here know how you are troubled with claims and applications from your constituents throughout the country, asking for offices and clerkships and all sorts of favors. All that would be as nothing in comparison with what would ensue under this bill. It would be simply intolerable from the political point of view, however plausible in theory it may be.

The CHAIRMAN. Why do you say that there would be no judicial review? Does not the amendment provide specifically for that?

Mr. NIMMO. Mr. Chairman, excuse me for not fully discussing that aspect of the case just now. I state that to you as a fact. I have gone into this in the book I have recently written. That is the opinion of the best lawyer I have consulted. I have gotten the best legal view I could. In the Supreme Court decision in the maximum rate case the court held that it is one thing to inquire whether rates that have been made are reasonable—that is a judicial act; but it is an entirely different thing to prescribe rates for the future—that is a legislative act. In the Joint Traffic Association decision the Supreme Court decided that public policy is what the law directs. I think it is a principle well estab-

lished that the courts will not overrule a law of Congress on the ground of its not being reasonable, or even on the ground that it violates an abstract principle of justice.

The CHAIRMAN. But has not the Supreme Court on several occasions held that where this legislative power was directly exercised by the legislature of a State in fixing rates that those rates were confiscatory and have set them aside?

Mr. NIMMO. Yes, sir. I will read right here from the pamphlet already referred to my view on that particular point. That is the very focus of the whole contention.

> While it is unquestionably constitutional law that no carrier can be compelled to carry freights at rates which are in effect confiscatory, yet a broad line of distinction lies between remunerative rates and confiscatory rates which in practice excludes the courts from the power to condemn any rate on the ground it is unjust or unreasonable. Without doubt the discretionary power proposed embraces the entire range of commercial profits which in practice justifies the construction and the operation of railroads. In a word, it is an autocratic and absolute power.

Now, there is a subject stated by Judge Knapp in regard to which I take issue with him on a question of fact. I think that in his zeal he has misstated a great fact. Judge Knapp declared that rates are exorbitant, and that they have not been reduced within the last ten years.

Judge KNAPP. I made no such statement as that.

Mr. NIMMO. The statement made was exactly this, that there has been no substantial reduction in rates during the last ten years.

Mr. KNAPP. I made no such statement.

Mr. STEWART. Judge Clements made that remark.

Mr. NIMMO. I want to be entirely right.

Mr. CLEMENTS. I made that remark in respect to the rate involved in the case I was then talking about.

The CHAIRMAN. It is not necessary that we discuss that matter.

Mr. NIMMO. I have the record here——

The CHAIRMAN. Our record will show what was said.

Mr. NIMMO. Judge Knapp said that there has been an apparent reduction in rates during the last year; that that apparent reduction, however, is deceptive; that it has been the result of the fact that there has been an enormous and disproportionate increase in the carriage of coal and other low freights. Am I right?

Mr. KNAPP. I said that.

Mr. NIMMO. That I deny. There is the issue of fact. I deny that statement by Mr. Knapp. Now I will come right to the point. Here I have compiled a statement. The Interstate Commerce Commission divides the railroads of the country into ten groups and works out a charge per ton per mile according to the statistics of the internal commerce of the country. I take the report of 1890 furnished me by the Interstate Commerce Commission, and also the one for 1900. Now, here are the rates, the charges for 1890 and the charges for 1900. This shows the reduction—16, 26, 21, 29, 24, 16, 22, 16, 28, 35, and for the whole United States 22½ per cent.

Revenue per ton per mile charged by railroads of the United States, according to statistics of the Interstate Commerce Commission.

	1890.	1900.	Reduction.
	Cents.	*Cents.*	*Per Cent.*
Group I	1.373	1.152	16
Group II	.828	.613	26
Group III	.695	.546	21
Group IV	.844	.595	29
Group V	1.061	.808	24
Group VI	.961	.806	16
Group VII	1.360	1.064	22
Group VIII	1.152	.964	16
Group IX	1.303	.938	28
Group X	1.651	1.067	35
United States	.941	.729	22½

Here we see by the Commission's own figures that comparing data for 1900 with the data for 1890 there was a fall in the average rate in each one of the ten groups ranging from 16 to 35 per cent, and that the average reduction for the whole country was 22½ per cent.

So I am compelled to say that the recent declaration of Mr. Prouty at Chicago as to advancing rates is absolutely erroneous or that the data upon the subject published by the Bureau of Statistics and the Interstate Commerce Commission are absolutely erroneous.

The attempt is made to refute these figures upon the ground that there has been an inordinate increase in the tonnage transported of low-grade rates, such as coal and ores. But I have shown in this statement, which I desire to submit as a part of my remarks, that there is not a particle of truth in this assumption, the general increase of tonnage having been proportionately greater than the increase in the tonnage transported of iron ore and coal.

The data just given is not affected by changes of classification, as it embraces freights of all descriptions without regard to class.

Now I come to the statement of Judge Knapp that these reductions in rates have been due to the inordinate increase in the carriage of coal, ores, and other low freight, and I assert to you that the reverse is true, namely, that the increase in the freights other than coal, iron, and so on has been more rapid than the increase in the total of iron, coal, and other low freights. I make this diametrically opposite statement, and I base it upon the statistics of the United States Government, published in the statistical abstract of the mining resources of the United States. The total tons carried 1 mile on railroads in the United States increased in ten years 86 per cent, while the coal marketed and the iron ore produced, according to the statistics of the Geological Survey, increased only 74 per cent. That is, coal and iron. The production in those articles did not increase as fast as the increase in the general merchandise of the country.

As a special example, I have taken group No. 2, which embraces the States of New York, Pennsylvania, and Maryland, and compared them with Pennsylvania, West Virginia, and Maryland, three great coal-producing States, as to the amount of coal produced, and I find that the

traffic on those roads of general merchandise increased faster than their traffic in the carriage of coal.

Now, in order to be specific, Judge Knapp made the statement to me verbally, and he has set me to work on these figures. I have written to six or eight railroads in different parts of the country, and I have brought to their attention this specific statement of Judge Knapp, and asked them if the rates I have read increased or decreased during the ten years.

There is one aspect of this case which seems to be lost sight of by Mr. Knapp. He says seven or eight hundred charges have been filed lately of increase in railroad rates. Here is a fact in railroad economics.

A classification or a schedule gets stale in about a year. This is a great and growing country; conditions are continuously changing, and so the classifications have to be changed. A railroad schedule may be all right to-day but it will be stale in about a year or two. This has been going on ever since we have had railroads. They have to meet together occasionally and adjust their classification. I have asked certain gentlemen to send to you and let you know whether the average cost of charges on those things has gone up or gone down.

Gentlemen, this whole talk about exorbitant rates in this country is sheer moonshine; without any feeling of disrespect I say it is nonsensical. In March, 1898, Mr. Knapp, the president chairman, who is present with us to-day, said:

> The question of excessive rates, that is to say, railroad charges which, in and of themselves, are extortionate, is pretty much an obsolete question.

The Supreme Court has in no case decided that a rate charged is in itself exorbitant, and I think I am not mistaken in saying that the question as to the reasonableness of any rate per se has never been proved in any Federal court.

In all these millions of transactions $20,000,000,000 worth of property moves every year, probably $25,000,000,000, and yet there has never been any rate which has been proven in a Federal court to be extortionate. The amount just stated is about twice the value of all the railroads of the country.

I next come to the question of discriminating rates. The question of discriminating rates was thrashed out in the Senate committee about two years ago. A resolution of inquiry, submitted by Mr. Elkins, who is now chairman of the Senate Committee on Interstate Commerce, was addressed to the Interstate Commerce Commission asking them certain questions about discriminating rates.

The Commission answered promptly, and this is about the result in all the United States during the ten years from April, 1890, to April, 1900. The total number of cases decided by the Commission was 180. The number of appealed to the court was 35.

The Commission was sustained in 4 cases; the Commission was reversed in 17 cases.

I now refer to something here which is highly commendatory, very highly complimentary, to the Interstate Commerce Commission. I like

to compliment the Commission, because they are estimable men. In its last annual report the Commission says:

The great mass of complaints are handled and disposed of by the Commission by preliminary investigation and correspondence. The total number of proceedings brought before the Commission during the year was 340, but only 19 formal proceedings were instituted before the Commission, or only 1 in 18 of the complaints preferred. There were only 10 cases decided by the Commission during the year, or 1 in 34 of the complaints entertained. This admirable result indicates the high degree of perfection to which the railroad system of the country has attained. It is also creditable to the act to regulate commerce and to its administration.

Now, the efficiency of this law has been questioned and denied, but with this section 16 put in force it is going to turn out to be a much better law than anybody thought it was going to be. Here is a Commission that hears these cases, 340 a year, as a conciliatory body and as an arbitration body, and they settle informally 321 cases out of the 340 cases submitted to them. Where is there a court in the United States that has such success as that?

This is a sort of a demonstration. This Commission has been looking with disdain upon the most admirable feature of this law. That is its conciliatory feature, its arbitration feature. It has a power to settle things out of court, and it has succeeded admirably in doing it. Why, sir, I regard it as one of the ornaments of our civilization, and am proud that we have a jurisdiction here that can settle 19 out of 20 cases submitted to its judgment. But notwithstanding this great administrative success they come here and say that this law is weak, and that they are powerless. They are exercising the finest kind of power that was ever exhibited by a civilized government, and they are doing it successfully.

Mr. CLEMENTS. The gentleman says they were settled. They were not settled. In most cases they were disposed of by leaving the shipper right where he was.

Mr. NIMMO. In the book that I have written I have gone into the subject of secret violations of published rates with great care and have made these declarations:

First. It has steadfastly denied—

I am referring to the Commission—

that it is in any especial manner responsible for the prevention of rate cutting.

I want Judge Knapp and these other Commissioners to bring the facts disproving these statements.

Second. It has opposed any amendment to the act to regulate commerce designed to afford the Commission greater facility for the enforcement of the penal provisions of the statute.

In other words it has treated not only with disdain but with aversion that very feature I have been talking about, that magnificent feature of conciliation.

Third. It has been derelict in the discharge of duties with respect to the prevention of rate cutting.

I have referred to the proceedings of the Judge to prove that.

Four. The remedy proposed by the Commission is not applicable to the cure of the evil complained of.

And that is the reason why we have resorted to section 16, aban-

doned the criminal, and invoked the civil remedy—the right arm of the law, and—

Five. The remedy proposed by the Commission is misdirected.

Those are the five statements I make in reference to the secret violations of published rates, in reference to the Interstate Commerce Commission taking action in connection therewith, and I desire here to introduce just what I have said upon that subject:

The Commission has strenuously maintained that it is not responsible for the prevention of rate cutting.

By the second section of the act to regulate commerce every departure from tariff rates is expressly forbidden and is declared to be illegal. By section 6 it is provided that in order to compel every common carrier to publish and file with the Commission its tariff rates, fares, and charges the "writ of mandamus shall issue in the name of the people of the United States at the relation of the Commissioners," and section 12 provides that "the Commission is hereby authorized and required to execute and enforce the provisions of this act;" for which purpose the Commission is given the widest possible powers of investigation, including the power to require by subpœna the attendance and testimony of witnesses and the production of all books, papers, contracts, and agreements and documents relating to any matter under investigation. The law distinctly provides that it may by one or more of its members prosecute any inquiry necessary to the discharge of its duties in any part of the United States. It has also the power to require every district attorney in the United States to prosecute all necessary proceedings for the punishment of violations of the act, and its findings in all judicial proceedings are made prima facie evidence as to each and every fact found.

Furthermore. it is provided by section 16 of the act to regulate commerce that if it is made to appear to any United States court "that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission and enjoining obedience to the same."

Notwithstanding these clearly prescribed powers and duties the Commission has, from the beginning, sought to repel the idea that by the act to regulate commerce it is especially charged with the duty of enforcing the provisions of the act against secret rate cutting—the paramount purpose of the act. In proof of the correctness of this assertion the following facts of record are adduced:

In its annual report to Congress for the year 1893, at page 7, the Commission declared that it "is wholly without authority as respects those discriminations between individuals which are made misdemeanors by that enactment," that "it is endowed with none of the functions pertaining to the detection and punishment of delinquents except such functions as may be exercised by private citizens," and (on p. 8) it deprecated the idea that it has anything to do with "uncovering the guilty transaction and bringing to justice those who engage in it."

In a letter addressed to Hon. William E. Chandler, a Senator of the United States from New Hampshire, under date of October 17, 1895, Hon. Martin A. Knapp, then an Interstate Commerce Commissioner and now chairman of the Commission, strenuously maintained that the prevention of the crime of rate cutting is a thing "with which the Commission has no power to deal." (Senate Doc. No. 39, Fifty-fourth Congress, first session, p. 14.)

For this and other declarations of similar import Senator Chandler administered to Mr. Knapp and to the Commission a sharp rebuke.

Mr. Knapp appears to have been then, as he has been ever since, laboring under the delusion that the duty of preventing rate cutting and other penal offenses denounced by the act to regulate commerce is incompatible with and beneath the function of revising all the freight tariff of the country, of prescribing rates for the future, and of determining the relative advantages to be enjoyed by competing towns, cities, and sections, and by competing industries throughout this vast country, a conception which he described in his letter to Senator Chandler as "my high ideal of the work in which the Commission is engaged," an idea which as I have endeavored to show is expressive of a malignant form of bureaucratic goverment, and as such utterly inconsistent with the govermental institutions of this country.

In its persistent denial of the fact that it is explicitly charged by the act to regulate commerce with the duty of preventing rate cutting the Commission flatly opposes its

opinion to that of the Supreme Court of the United States. In the Maximum Rate Case (167 U. S., 479) the court said:

"It (the Commission) is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done by rebate or any other device to give preference to one against another; that no undue preferences are given to one place or places or individual or classes of individuals, but that in all things that equality of right, which is the great purpose of the interstate-commerce act, shall be secured to all shippers."

But, as before stated, in this as in other respects the Commission has not and does not to-day hesitate to oppose its opinion to that of the Supreme Court of the United States regarding the interpretation of the statutory or constitutional law of the land.

The Commission has repelled any attempt to give it greater power in enforcing the penal provisions of the act to regulate commerce.

Not content with a denial of its duty to prevent rate cutting the Commission has deprecated the idea of increasing its power to prevent the commission of misdemeanors, particular reference being had to rate cutting. On page 7 of the seventh annual report of the Commission is found the following declaration:

"But the main point to be considered is that Congress has no power to clothe the Commission, or any similar tribunal, with authority to execute the penal provisions of this statute, other than to aid prosecuting officers in procuring evidence against suspected parties."

And again on page 8:

"No amendment of this statute, therefore, is necessary or suitable with the view of giving greater power to the Commission in enforcing its penal provisions."

But when driven from the charges of exorbitant rates and unjustly discriminating rates as possible excuses for demanding of Congress autocratic power the Commission glaringly stultifies itself by seeking to secure amendment to the act to regulate commerce for the purpose of preventing rate cutting through an expedient which as herein shown is not only out of all proportions to, but totally inapplicable to the offense, besides being essentially revolutionary.

The repudiation by the Commission of responsibility for the prevention of rate cutting and its simultaneous effort to prevent any strengthening of its powers for that purpose which would be subject to judicial review clearly indicates its fixed purpose and desire to free itself of any sort of cooperation with, or dependence upon, the judiciary in the discharge of its official function.

The Commission has been derelict in the discharge of its duty with respect to the prevention of rate cutting. The Commission has neglected the duty of using its best efforts to aid in detecting and in bringing to punishment persons who have been guilty of the offense of rate cutting and other misdemeanors, a duty plainly incumbent upon it under the provisions of sections 2, 6, 10, 12, and 16 of the act to regulate commerce. This seems to be the result of the extreme aversion entertained by the Commission toward that class of duties.

In the fifteenth annual report of the Commission, submitted January 17, 1902, at page 8, appears the following:

"To convict for unjust discrimination it is necessary to show not merely that the railway company paid a rebate to a particular shipper, but it must also be shown that it did not pay the same rebate to some other shipper with respect to the same kind of traffic moving at the same time under similar conditions. As a practical matter this is almost always impossible."

The rule of law here stated by the Commission was announced by Judge Grosscup, of the northern district of Illinois, in a decision rendered June 20, 1896, in the case of United States *v.* Hawley (71 Fed. Rep., 672), with which case the Commission had nothing to do. It is as follows:

"This case illustrates that whatever difficulties there are in the enforcement of this act are not so much due to the law itself as to the failure of the prosecution to gather up and lay before the grand jury the essential facts of a case. The facts difficult to obtain—the transaction between the carrier and the favored shipper—are fully spread upon this indictment. The facts not difficult to obtain—the identity of the shipper discriminated against—constitute the fatal omission. Ordinary alertness and intelligence would have avoided this pitfall."

Herein the court declared that the facts as to the identity of the shipper discriminated against are "not difficult to obtain" and sharply animadverted upon the failure to obtain them, whereas the Commission, in its annual report, dated January 17, 1902, has declared that the discovery of such facts "is almost always impossible."

In this the Commission flatly opposes its opinion to that of the judiciary and of every freight traffic manager in the country. I mention this contrariety of opinion upon a matter easily susceptible of proof as one worthy of Congressional inquiry.

The judicial opinion just cited relates particularly to the offense of unjust discrimination. But in the same case the court stated the fact that it is a violation of the law to charge less than the tariff rate. Even this offense, not involving any charge of unjust discrimination, the Commission seeks to ignore, declaring that the law "does not punish (it) otherwise than by a possible nominal fine." The law, however, explicitly prescribes for this particular offense a fine of "not to exceed $5,000."

The declaration of the Commission that the act to regulate commerce does not confer upon it ample power to prevent rate cutting is strenuously denied by able lawyers and jurists who hold that sections 2, 6, 10, 12, and 16 of the act give it ample power to correct and prevent such offenses. If, however, the law is in this respect defective, by all means let it be amended so that the procedure may be freed from any political difficulty.

Differences of opinion prevail as to the nature of the remedy which should be adopted for the prevention of rate cutting. In its fifteenth annual report, submitted January 17, 1902, the Commission suggests as a remedy for rate cutting that the corporation as well as its officers should be subject to the penalty prescribed in the act. The general solicitor of one of the great trunk lines of the country suggests that the corporation alone ought to be subject to the penalty. The question is one to be determined by Congress and is worthy of careful consideration.

It is believed that any proper amendment to the act in regard to rate cutting would be cheerfully accepted by the principal railroad managers of the country, and that they would cordially cooperate in the enforcement of the law. The public attitude assumed by the leading railroad officials of the country toward this subject seems fully to sanction this statement.

In this connection it is worthy of observation that the Commission fails to show in how many cases it has given the courts a chance to consider rate cutting upon evidence which the court declares not difficult to obtain, or to adduce evidence upon which the courts may impose what the Commission calls "a possible nominal fine," but which may amount to $5,000 and which with ordinary diligence can be imposed.

It is believed that if the Commission had been half as earnest in the attempt to prevent rate cutting as it had been in its efforts to secure autocratic power, the misdemeanor complained of would now be very much less the subject of complaint. It is believed also that a thorough Congressional investigation of this particular subject would clearly expose a manifest dereliction of duty on the part of the Commission.

The history of the case exposes the aversion of the Commission to a duty clearly imposed upon it by the interstate-commerce act, and this is exhibited nowhere so glaringly as in the oft-repeated assertion of the Commission that it has been deprived of the power to afford relief to complainants against wrongs incident to infractions of the law, and that is not responsible for the prosecution of specific violations of the provisions of the act to regulate commerce, both of which statements are strenuously denied.

A recent news item indicate that at last the Commission has awakened to a realization of the fact that the law imposes upon it a duty with respect to the suppression of rate cutting, and that it is disposed to try to set in motion the means for accomplishing that object before the courts, as provided in the act to regulate commerce.

The remedy proposed by the Commission is not applicable to the cure of the evil complained of. The plan of conferring upon the Commission the power to prescribe rates is totally inapplicable to the offense of rate-cutting. It has no relation to such offenses as a means to an end. The Commission has never sought to show that it has such relation. There is not the slightest reason to believe that rates made by the Commission would be any more exempt from rate cutting than are rates made by the companies. The true remedy pointed out by the judiciary and by the lessons of experience lies in a faithful enforcement of existing laws, which the Commission has spurned and neglected to enforce. Such laws, however, may be amended or supplemented by others which would facilitate the administrative work of the Commission, for the question is one of procedure and not one as to the power to act.

The history of the course pursued by the Commission in this matter clearly indicates that the idea of asking Congress for autocratic power over the commercial, industrial, and transportation interests of this country in order to suppress rate cutting is an afterthought. Rate cutting is now brought to the front apparently from the fact that the Commission sees no other means of advancing its claim to the exercise of autocratic power either in exorbitant rates or in unjustly discriminating published rates.

Secret violations of published rates have their origin in the competition of rival commercial forces and are expressions of such struggles. This is apparent to merchants and to railroad managers throughout the country, and as such is deprecated by them. The fact is also clearly perceived that the remedy for such evils lies primarily in railroad self-government dictated by enlightened views of self-interest, the inspiring motive of all wholesome statutory enactments. Unfortunately the Commission has frowned upon such self-restraint and sought to substitute therefore its claim to the exercise of arbitrary power.

The question is one of vast political import and should not be left to the discretion of any administrative body—certainly not to any bureau of the Government bent upon the acquisition of autocratic power over the commerce and industry of this country. It is eminently a question for Congressional determination.

Besides, it may be observed in this connection that the duty imposed upon the Commission by the twenty-first section of the act to regulate commerce, to recommend to Congress such additional legislation "as the Commission may deem necessary," does not extend to great questions of public policy or to political questions which would naturally command the attention of Congress, but in the language of Mr. Justice Shiras in Texas and Pacific Railway *v.* Interstate Commerce Commission (162 U. S.), should "be confined to the obvious purposes and directions of the statute." It is to be regretted that the Commission has not been guided throughout by this obvious rule of property.

Beyond all question the remedy proposed by the Commission is misdirected. There are always two parties to offenses involving contractual relationships. In the case of rate cutting these are the shipper and the carrier. The shipper is invariably the prompter to the offense, for it is always to the interest of the carrier to secure tariff rates and to the interest of the shipper to secure less than tariff rates.

The concrete cases which supply the text and ostensible cause of the present movement of the Interstate Commerce Commission for the purpose of preventing rate cutting is furnished mainly by the persistent efforts of certain large shippers of packing-house products of the West to secure less than tariff rates for the carriage of their products. It is an old story, to which public attention has been several times directed during the last two years. So uniform, however, has been the "cut" by the several competing companies that it constitutes practically a common rate, lacking only the legal requirement of publicity. The rates actually charged would avoid the censure of being "cut rates" if they were published. They involve no material discrimination with respect to producers, localities, or shippers, but do involve most outrageous discrimination with respect to carriers. All this is clearly stated by the Commission in its annual report just published. Therein it adduces the fact that at one time a particular road "was carrying into Kansas City 33⅓ per cent of the cattle slaughtered there and carrying out of that city only 2 per cent of the product."

The Commission also shows, in the report mentioned, that the cut rates are a source of benefit to the producer, the consumer, and the packer. At the same time they involve enormous loss to the carriers. This is stated by the Commission in reply to two self-addressed inquiries: First, "Who has the benefit of the reduction in these rates?" and, second, "Does it result in advantage to the producer and consumer, or is it absorbed by the packing house itself." The answer of the Commission to these questions is as follows:

"It seems probable that in case of a reduction like this, which seems to be tolerably uniform and long continued, the general public must obtain some advantage, but we think that in the main these sums swell the profits of the packers. The number of these great concerns is only some five or six, and there does not appear to be much discrimination between them. Each usually knows about what the lowest rate is and usually manages to obtain that rate."

This clearly expresses the whole matter at issue. The cut rate is practically a common rate, and irregular only because not published as required by law. This results in some benefit to the producer and the consumer, much more to the packer, and appalling loss to the carrier—the railroad company. This conclusion has been laconically expressed as follows by one of the Interstate Commerce Commissioners since his recent return from Chicago: "The fact is that five or six big shippers have for years been sandbagging the railroads." Hence the question arises, Why attempt to punish those who are sandbagged, instead of having recourse to some plan to punish the sandbaggers? But it is just this injustice and manifest solecism into which the Commission has unconsciously stumbled in its most unreasoning desire to acquire a coveted power by visiting upon the railroad companies the severest and most humiliating punishment, namely, that of depriving them of the right to contract freely with the general public as to the commercial value of the service which they render and with no other apparent excuse than an utter inability to base their claim to autocratic power upon any other plausible pretext.

What has been said of rates on packing-house products applies substantially to complaints as to "cut rates" on wheat and flour. The latter involves a long and sharply debated question as to the relative rates on wheat and flour. This is a complex and involved commercial and economic question. The general but rather vague conclusion of the Commission in regard to it is expressed as follows on page 16 of its last annual report:

"To an extent the rate upon flour in the foreign market must be higher than that

upon wheat. This is decreed by physical conditions which no statute and no commission can alter. To that extent this industry must expect to operate at a disadvantage."

In the light of all these facts the proposition to have recourse to the haphazard and absurdly misdirected remedy of governmental rate making for the cure of problematical evils attending the transportation of provisions, flour, and wheat and the commerce in these commodities would be as absurd as it would be monstrous.

A congressional investigation as thorough and as impartial as that known as the "Cullom investigation of 1886" would not fail to set all these difficulties in their true light and to disclose a remedy which would be properly directed and efficacious.

I have sought neither to palliate nor to defend rate cutting. Its extent and effects have been greatly magnified for the purpose of predicating upon it the Commission's claim to the exercise of autocratic power, but it is an undoubted evil, and has no defenders other than those shippers who practice it to their own advantage and to the detriment of their competitors and of the carriers. Beyond all doubt it is an evil which can be abated and as successfully prevented as are other misdemeanors which are mala prohibita.

Mr. Chairman, there is one subject I would like to speak to you about, in which I am very much interested, and that is the importance of a thorough Congressional investigation of the railroad problem. During our long period of railroad construction we have had only one thorough investigation on this subject. These hearings, you know, are partial. Your time is broken in upon, but to come down to a thorough investigation, we have had but one, namely, the Cullom investigation of 1886. Even the Windom investigation of 1873–74 was not a complete railroad investigation. I was employed as a specialist by the Windom Commission on this very question. Subsequently I studied the question carefully and wrote a series of reports on it as Chief of the Bureau of Statistics, the result of ten years of investigation.

In England, since 1840, they have had ten Parliamentary investigations. With only one twenty-fifth of the area, and with only 22,000 miles of railroad, as against 200,000 miles of railroad in the United States, Great Britain has had ten investigations on that subject. I have worked up something upon that subject with great care, and I will hand it in; and I want to say that when you consider all the complexity of conditions—these difficulties—I have been studying this subject for over forty years. I began to write on it in 1856, when I was employed as a civil engineer on one of the first railroads constructed in Iowa. There is nothing I crave so much as the knowledge which would come from a thorough and impartial Congressional investigation, such as was had in England, which was started in 1842. Mr. Gladstone was chairman of that investigation, and it was an example for all the commissions which have followed in England.

The following is the statement referred to in the course of this hearing in regard to the importance of a thorough Congressional investigation of the railroad transportation question in this country.

INVESTIGATION BEFORE LEGISLATION.

The many vitally important questions which confront the country touching any attempt at a radical change in our laws relative to the regulation of the railroads seem to point unerringly to the necessity for a thorough Congressional investigation of the subject in advance of any attempt to legislate upon it. In this we may profit very much from the example set by the people of Great Britain.

As early as the year 1840 questions arising out of the independent corporate ownership and control of the railroads agitated the public mind in Great Britain. The old

British ideas of liberty involved in the consideration of monopoly, competition and combination, which from time immemorial had been the subject of heated public discussion and of reflective judicial debate, gave rise to just such apprehensions and political theorizing as those which now seriously affect public sentiment in the United States.

A British statesman of influence declared at an early date that "the State must govern the railroads or the railroads would govern the State." George Stephenson—eminent as a civil engineer—declared that "where combination is possible competition is impossible." These expressions were for years accepted in Great Britain as politico-economic dogmas.

In the year 1844 a strong Parliamentary committee was appointed for the purpose of inquiring into and providing against the assumed danger. The Hon. William E. Gladstone was chairman of that committee. Its labors resulted in an act of Parliament (act 7 and 8 Victoria, 85) passed in the year 1844, wherein it was provided that the Government might, upon terms stated in the act, at the expiration of fifteen years after completion, purchase any railroad constructed after the passage of the act. In a word, the British Parliament provided, constitutionally, for Governmental ownership and control of the railroads. But that power has never been exercised, and the public sentiment of Great Britain to-day utterly repudiates any such policy.

This has come about as the result of the lessons of experience and of patient and persistent Parliamentary inquiry, reference being had particularly to the Parliamentary investigations of 1840, 1844, 1846, 1852, 1865, 1867, 1872, 1881, and 1893-94. The results of these ten Parliamentary inquiries were that the asserted dogmas hereinbefore quoted have been exploded, while other baseless notions, such as those which now to a greater or less degree possess the public mind in this country, have been dispelled; and the ancient principles of liberty and methods of justice still prevail in the regulation of the railroads of Great Britain. In this regard railroad regulation in that country strikingly illustrates the favorite British maxim, "We have government by discussion."

But how different has been the practice in this country. With an area exclusive of Alaska and our insular possessions, 25 times that of Great Britain and Ireland, and a railroad mileage of 192,161 miles, as against 22,000 miles in Great Britain, we have had only one thorough Congressional investigation, namely, that conducted in the year 1886 by the Senate Committee on Interstate Commerce. The act to regulate commerce drawn by Senator Cullom, chairman of that committee, is loyal to the fundamental American principles of government, that all contested questions affecting the commercial interests of the country shall be subjected to the test of judicial inquiry and determination. But the Populistic proposition confronts the country in favor of eliminating the courts from this domain of justice and in lieu thereof of substituting an autocratic rule of administrative authority, without any Congressional investigation whatsoever.

There are also other and exceedingly important questions which demand Congressional investigation and public scrutiny in the light of such inquiry. Some of these questions are more important than those determined by the Senate investigation of 1886.

The magnitude and importance of the commercial, financial and industrial interests involved repel the very idea of any radical legislation in advance of such inquiry as that here suggested.

Beyond all doubt, a thorough Congressional investigation of the various commercial, economic, and political questions involved in the general subject of railroad regulation in this country would develop results quite as salutary as those realized in Great Britain. It may also be stated in favor of such action that the two committees of Congress, as at present constituted, are admirably fitted for such inquiry.

In his recent annual message to Congress, President Roosevelt referred to the railroads as "the arteries through which the commercial lifeblood of this nation flows;" and in urging the importance of investigation said: "The whole history of the world shows that legislation will generally be both unwise and ineffective unless undertaken after calm inquiry and with sober self-restraint."

A SUPPLEMENTAL STATEMENT BY JOSEPH NIMMO, JR.

[Submitted May 22, 1902.]

Mr. CHAIRMAN: In his testimony before the Committee on Interstate and Foreign Commerce of the House of Representatives, Commissioner Prouty stated, at page 238, that 807 complaints against advances in rates or against rates which are alleged to be too high have been filed with the Commission during the last three years. A similar statement was made by Commissioner Prouty in an address delivered at Chicago on April 2, 1902, before the Illinois Manufacturing Association. On that occasion he said:

> While it [the Commission] can not grant relief, there are now pending before it for investigation complaints involving millions of dollars—I think I might say millions annually.

Manifestly these statements are calculated to convey the impression that the charging of exorbitant rates is now rampant throughout the country. But this is absolutely refuted by the annual reports of the Commission, which show that during the last three years only 23 cases in all were decided by the Commission upon formal hearings, which cases embrace only 8 complaints of unreasonable rates per se. Of these the unreasonableness of only 4 was sustained by the Commission, constituting less than one-half of 1 per cent of the 807 complaints alleged to have been made to the Commission. This clearly indicates either that the Commission has been derelict in the discharge of its duties or that nearly 800 of the 807 complaints were inconsequential or outside the function of the Commission. The latter is undoubtedly the correct view of the case. Besides, the fact that not a single case of exorbitant rates has been sustained in the courts during the fifteen years of the life of the Commission raises the presumption that not one of the 4 cases of exorbitant rates in the entire United States, as determined by the Commission during the last three years, would stand the test of judicial inquiry.

The total number of cases decided by the Commission each year during the last three years, and the number of cases of unreasonable rates tried and sustained, according to the last three annual reports of the Commission, are stated in tabular form as follows:

Year.	Total number of cases decided.	Number of cases of unreasonable rates.	Number of complaints of unreasonable rates sustained.
1899	5	1	1
1900	8	4	1
1901	10	3	2
Total	23	8	4

The data from which this statement was compiled are found on pages 20 to 43 of the report of the Commission for 1899, on pages 34 to 48 of the report for 1900, and on pages 22 to 39 of the report for 1901.

Hon. Martin A. Knapp also attempted to create the same impression as to the charging of exorbitant rates, notwithstanding the fact that the statistics of the Commission indicate an average reduction of 22½ per cent for the entire country from 1890 to 1900, and a substantial reduction in the average rate in each one of the ten groups into which the railroads of the country are divided by the Commission. Mr. Knapp attempted to overcome these facts by asserting that the apparent reduction in rates is the result of a disproportionate increase in the quantity of low-grade freights, such as iron ore and coal transported during the last ten years. This statement is without any foundation in fact, the tonnage of merchandise transported other than coal and iron ore having increased faster from 1890 to 1900 than did the tonnage of coal and iron ore transported. This is explained at length on pages 24, 25, and 26 of my recent pamphlet entitled A Commercial and Political Danger. It is also confirmed by the traffic records of the leading trunk lines of the country east and west.

The following table compiled from the data of the Interstate Commerce Commission for the years 1890 and 1900 indicates the fall in rates by groups and for the whole country:

Revenue per ton per mile charged by railroads of the United States according to statistics of the Interstate Commerce Commission.

	1890.	1900.	Reduction.
	Cents.	*Cents.*	*Per Cent.*
Group I	1.378	1.152	16
Group II	.828	.613	26
Group III	.695	.546	21
Group IV	.844	.595	29
Group V	1.061	.808	24
Group VI	.961	.806	16
Group VII	1.360	1.064	22
Group VIII	1.152	.964	16
Group IX	1.303	.938	28
Group X	1.651	1.067	35
United States	.941	.729	22½

Data in the column for 1890 is from the statistics of the Commission for 1890, page 72, and the data for 1900 is from statistics of the Commission for 1900, page 95.

The facts thus stated prove beyond all doubt that in all our splendid American railroad system, embracing about 200,000 miles of road, over which moves about $25,000,000,000 worth of merchandise annually, or more than twice the value of the entire railroad system of the country, and involving millions of transactions every year, only 3½ cases a year of unjust discriminations were proven in formal hearings before the Commission during the ten years from April 16, 1890, to April 16, 1900, a fact stated by the Interstate Commerce Commission in Senate Doc. No. 319 of the Fifty-sixth Congress, first session. Of this small number less than one case a year of unjust discriminations was

sustained by the courts. Furthermore, not a single case of unreasonable or exorbitant rates has been sustained by the Federal courts during the fifteen years since the Interstate Commerce Commission was organized.

THE POLITICAL ASPECTS OF THE CASE.

The fact adduced by Commissioner Prouty that during the last three years 807 complaints of unreasonable rates were filed with the Commission, of which only 4, or less than one-half of 1 per cent, were found to be well founded, has a much more important significance than the members of the Interstate Commerce Commission seem to have imagined. It serves to illustrate a fact of controlling force respecting the broad subject of regulating the commerce among the States, namely, the fact that from the beginning the complaints which have been filed with the Commission have had their origin chiefly in the discontent incident to struggles for commercial advantage. But such discontent is the chief stimulant of commercial enterprise. It involves problems which must be wrought out by human intelligence and enterprise and not by any sort of governmental interference; for we live in a world in which we are all debating. Every individual, and every section, State, city, county, town, village, and hamlet in this country is at rivalry with competitors near and far and it is preposterous for any governmental agency to attempt to reconcile those antagonisms. They are intangible to any sensible or just method of governmental regulation. The exemption of such antagonisms from governmental interference is a natural and proper expression of the freedom of commercial and industrial intercourse.

Faith in the conservatism, which inheres in the untrammeled interaction of commercial forces has begotten the maxim "competition is the life of trade," a maxim which has found its way into our statute laws and has become a tenent of judicial faith and practice. So firmly are the people of this country imbued with this sentiment that for nearly an hundred years after the founders of our Government had incorporated into the national Constitution the provision that "Congress shall have power to regulate commerce among the States," no systematic attempt was made to exercise that power, and clearly owing to the danger attending any attempt to meddle with a commercial interaction which is not and can not properly become the subject of governmental concernment.

But at last by the act to regulate commerce approved February 4, 1887, an apparent but limited and clearly defined exception was made to this policy of noninterference with commercial struggle. The restraints provided by that act, however, applied exclusively to the struggle of railroad transportation and not to the struggles of trade or of industrial pursuits. Moreover, the restraints imposed by the statute had already become approved as proper methods of railroad self-government after the various lines of the country had become closely connected and cooperative members of one great transportation organism—the American railroad system. As such, these restraints constituted a part of the American common law of the highway, being based upon the lessons of experience and that concensus of public sentiment which Lord Bacon has characterized as leges legum.

Unfortunately, and as subsequently was proved, without any sanction of law the Interstate Commerce Commission assumed, in the maximum-rate case decided by it in the year 1894, that the act to regulate commerce authorized it to prescribe both absolute and relative rates for the future. This assumption of authority clearly and inevitably embraced the power to determine the relative commercial status of competing cities, towns, States, and sections affected by that decision. This monstrous assumption of political power was denied by the Supreme Court of the United States in the year 1897. (167 U. S., 479.) But not satisfied with this judicial determination of the case, the Commission has ever since importuned Congress to grant to it the desired power. That demand is involved in the Corliss bill. It is a political heresy which should be resisted in its beginning, and under every guise and pretense of restraint.

That the attempts of the Commission to secure the rate-making power intentionally and of necessity involves the Eutopian idea of securing control of the internal commerce of the country is evident from the utterances of the Commission during the last ten years, but perhaps nowhere more strikingly than in the following declaration found on page 10 of its seventh annual report:

> To give each community the rightful benefits of location to keep different commodities on an equal footing, so that each shall circulate freely and in natural volume, and to prescribe schedule rates which shall be reasonably just to both shipper and carrier is a task of vast magnitude and importance. In the performance of that task lies the great and permanent work of public regulation.

This expression of its "high ideal" of the work of regulation is a clean-cut proposition by the Commission to commit the Government of the United States to the task of determining all the difficulties involved in the commercial and industrial interaction of the wealthiest, the most enterprising, and the most virile nation on the globe, a matter with which the Government should not meddle. As such it is rank political heresy. It is also wildly impractical and revolutionary.

The fact that of the 807 complaints of unreasonable rates filed with the Commission during the last three years only four, or less than one-half of 1 per cent were susceptible of demonstration under known principles of adjudication indicates that about 800 of the 807 complaints were of the sort which can not be made the subject of governmental concernment. This clearly exposes the absurdity of the proposition "to give each community the rightful benefits of location," to adjust the commercial and industrial interaction of this great and growing nation, and to accomplish that purpose by setting up at the seat of the National Government a bureau endowed with the function of prescribing rates for the future with the chimerical object in view of "keeping different commodities on an equal footing" throughout the length and breadth of this land. This is a wide departure from the views of public policy touching the interaction of commercial and industrial forces which were entertained by the founders of our Government, which operated as a barrier to any sort of regulation for ninety-eight years, and which are dominant in this country to-day.

As a further illustration of the fact that the complaints which are

addressed to the Interstate Commerce Commission are mainly of the class not subject to governmental concernment, the fact may be mentioned that in its last annual report the Commission said:

> The total number of proceedings brought before the Commission during the year was 340. These include formal as well as informal complaints.

But only ten decisions were rendered by the Commission during the year on formal proceedings, only two of which involved unreasonable rates. In a word, the complaints of all sorts brought to the notice of the Commission had their origin mainly in commercial and industrial conditions completely outside the purview of governmental regulation.

I think, Mr. Chairman, that if you will carefully review the testimony of all the representatives of the various trade and industrial bodies who have laid their grievances before you at these hearings, you will find such grievances to be of the intangible character just described, being merely expressions of struggles for commercial advantages, and not based upon any clearly defined errors or acts of injustice on the part of the railroad carriers. An appreciation of this fact seems to have been indicated by the repeated demand of members of this committee for definite information tending to justify the passage of the bill now under consideration—a demand which, in so far as I was able to discern, was in no specific manner complied with.

It would be difficult for Congress to differentiate between complaints, which are based upon the conditions of commercial struggle and those complaints which are valid subjects of regulation under the terms of the act to regulate commerce, except in general terms expressive of the firmly established policy of the Government upon the subject. The distinction in concrete cases must be based upon the specific facts which govern in each particular case. The only object had in view in this connection has been to utter a word of warning against a policy which would devolve upon the National Government full responsibility for the course of the commercial and industrial development of this country with all the dangers of sectional political struggle which would be engendered by such a departure from the principles of commercial freedom upon which our governmental institutions are founded.

There is another political aspect of the proposition to confer practically autocratic power upon the Interstate Commerce Commission to which I would here briefly allude. On pages 15 to 22 of my recent pamphlet entitled "A Political and Commercial Danger," I stated at some length the reasons which sustain the belief that any provision of law granting to the Commission the power to prescribe rates for the future would eliminate the Federal judiciary from the function of passing upon the reasonableness of rates. This view is fully sustained by Mr. Commissioner Knapp on page 296 of the present hearing, as follows:

> While the determination whether a given rate is—that it has been—reasonable or not is a judicial question, the determination of the rate to be substituted in the future is not a judicial question, can not be made a judicial question, and that authority, if exercised at all under the circumstances, must be exercised either by the legislative body itself, or by an administrative tribunal, to which some portion of the legislative power has been delegated. Now, that being so, of course you must bear this in mind, that it is incorrect and misleading to speak of an appeal from the order of the Commission.

Mr. Knapp has made a labored argument to the effect that the determination of the Commission—a mere administrative body, without permanent tenure of office and subject at all times to play of political forces—would be made in a judicial manner, and therefore would have practically the same effect as decisions rendered by the courts. This is too feeble for serious consideration. It would be superfluous to attempt any labored argument upon this point before a committee composed mainly or entirely of lawyers.

The independence of the Federal judiciary has made it the bulwark of the liberties of the people. So long as the courts have final determination of all questions of commercial right, the time-honored policy of noninterference in the competitive struggles of trade will be maintained, but when the courts are eliminated from the determination of such questions, the storm of political demand for commercial advantage will break loose, and the Commission and the political representatives of the people in Congress will bend to the blast. Besides, the sectional political struggles which would ensue from such a policy would endanger the permanence of our governmental institutions.

The exceedingly limited and in most cases utterly ineffectual way in which Commission rate-making exists in certain of the States of the Union affords no conception of the results which would ensue from placing the interstate and foreign commerce of the country under the control of a body characterized by Commissioner Prouty as "partly political, and to an extent partisan."

JOSEPH NIMMO, Jr.

HB-14-1-65

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